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No. 75-807

In the Supreme Court of the United States

OCTOBER TERM, 1975

PAUL T. WIGODA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner's sole contention (Pet. 8-12) is that a remark by the prosecutor in his summation to the jury deprived him of a fair trial.

1. After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of filing a false income tax return for 1969 by substantially under-reporting his gross income, in violation of 26 U.S.C. 7206(1). He was sentenced to a one-year prison term. The court of appeals affirmed (Pet. App. A 1-18).

The pertinent facts are as follows: In 1965, Roy Gottlieb and Kenneth Tucker signed an agreement to purchase the Edgewater Golf Club in Chicago for $7.6 million, and later acquired title to that property. Petitioner was a member of the Chicago City Council's Committee on Building and Zoning and the Chicago Plan Commission, as a representative of the 49th Ward, which bordered the

ward containing the Edgewater propery (Pet. App. A 2-3). Between 1965 and 1969, by votes and other official actions favorable to the wishes of the new owners of the Edgewater property, petitioner assisted in making it possible for them to sell the property to the State of Illinois and the Chicago Public Buildings Commission for $18.3 million, which gave the developers a substantial profit (Pet. App. A 3-6). In April, 1969, Gottlieb and an attorney named Haskins met at Haskins' office and Gottlieb handed Haskins a sealed envelope containing $50,000 in currency. Thereafter Haskins telephoned and then visited petitioner's office, where he handed him the sealed envelope, telling him that "Gottlieb wanted me to give you this." Petitioner did not report the $50,000 as income (Pet. App. A 6).

During the trial the jury learned that there were conversations between Gottlieb and petitioner, Haskins and petitioner, and Haskins and Gottlieb, with respect to the Edgewater property. However, the trial judge refused to admit into evidence the substance of the Haskins-Gottlieb conversations (Pet. App. A 13). Although the government offered to prove that Haskins had told Gottlieb that he needed $50,000 to "spread * * * around" (Tr. 225c), the trial judge excluded such evidence apparently because he concluded the possible prejudice might outweigh its probative value (see Pet. App. A 13, n. 4).

In his closing argument to the jury, the prosecutor called attention to a conversation between Gottlieb and petitioner in which Gottlieb allegedly "got the message across" that petitioner could expect remuneration for his help. The prosecutor also referred to a conversation between Haskins and Gottlieb which led to procurement of the $50,000 (Pet. App. A 14). Thereafter, the prosecutor stated (Tr. 928):

> Now, it doesn't really matter what took place in those conversations between the parties that were not admitted into evidence. However, you, the eleven jurors, may use your common sense and you may call upon your own human experience and common sense and I don't think you have any difficulty in inferring what was said in these conversations.

When the defense objected on the ground that the prosecutor was "asking the jury to infer something from nothing" (Tr. 928), the following colloquy between the court and prosecutor occurred in the presence of the jury (*ibid.*):

> THE COURT: I think the lawyers are entitled to make such logical inferences as the evidence warrants. It is up to the jury to judge those inferences which are not warranted and they may certainly disregard them.
>
> All right.
>
> MR. WEBB [the prosecutor]: What was said in these conversations isn't really important because the crime charged in the indictment is a simple crime. The indictment charges Mr. Wigoda received a $50,000 payoff for whatever reason and didn't report it on his tax return.

Petitioner moved for a new trial on the ground that the prosecutor's remark deprived him of a fair trial. While the trial court agreed that the remark was improper, it denied the motion because it concluded that it could not have been prejudicial, stating in a written order as follows (Pet. App. A 15-16):

> In reviewing the entire record, this court does not believe—based upon its twenty-five years experience as a trial judge—that this remark, modified by the judge and corrected by the prosecutor and collateral to the case was sufficiently prejudicial to sway a

juror. While in every instance it is important to strive to conduct a perfect trial, this goal is rarely ever achieved and so the courts make no such demand.

* * *

Had this court any serious doubt that Wigoda's rights had been prejudiced, defendant would be granted a new trial. We have no such doubt, and so defendant's motion for a new trial is denied, and judgment is entered on the verdict.

In affirming the conviction, the court of appeals emphasized that the prosecutor immediately discounted the significance of the conversations to which he referred in his remark (Tr. 928), that the trial court instructed the jury to consider only matters in evidence (Tr. 1053) and that counsel's argument was not evidence (Tr. 1059) and that the trial court determined the remark was neither prejudicial in the context of the entire trial nor was it germane to the central question of the credibility of the witnesses. Since the prosecutor noted that the conversations were not important to the verdict of the jury, the court of appeals "agree [d] with the trial court that the request for an inference as to the contents of these conversations was not prejudicial error in this case" (Pet. App. A 17).

2. Contrary to petitioner's contention (Pet. 8-12), the prosecutor's remark did not deprive him of a fair trial. The fact that the conversations took place was in evidence. Thus, *United States* v. *Fearns*, 501 F.2d 486 (C.A. 7), and *United States* v. *Martinez*, 514 F.2d 334 (C.A. 9), relied upon by petitioner (Pet. 9), are distinguishable, since those cases involved situations where the prosecutor explicitly stated as fact matters which had not been presented to the jury. Here, on the other hand, the prosecutor did no more than suggest that the jury draw upon their common sense and human experience to infer the contents of the conversations.

Moreover, as the courts below found, any error arising out of the prosecutor's statement was harmless. The remark to which objection was made was but a single, isolated statement in a closing argument which covers 60 pages of transcript (Pet. App. A 15) and was made in a trial which covers 868 pages of trial transcript (Pet. App. A 15, n. 6). Thus, the prejudicial impact of the statement, if any, was minimal because the statement did not affect a central issue in the case. As the court of appeals correctly noted (Pet. App. A 17):

> No one, other than Haskins, testified that the envelope containing the money was originally intended for or actually delivered to the defendant. Defendant took the stand and denied ever receiving the envelope with the money and further denied performing any services meriting such a payment. The crucial question decided by the jury was, therefore, which of the two men testified truthfully as to the delivery of the money. The prosecutor's request for a common sense inference as to the contents of certain conversations is not really germane to the crucial credibility question facing the jury. The jury's idea of what was said in these conversations would, it seems, depend upon which of the two crucial witnesses they believed. The jury made that credibility determination based upon its judgment as to the demeanor and possible bias of the two men and the weight which it accorded the circumstantial evidence introduced, particularly the evidence intended to show how defendant "earned" the payoff. Thus the contents of the conversations were, as the prosecutor twice noted, not important to the verdict of the jury.

See *United States* v. *Maenza*, 475 F.2d 251, 254 (C.A. 7); *United States* v. *Doran*, 483 F.2d 369, 373 (C.A. 1), certiorari denied, 416 U.S. 906; *Gaither* v. *United States*, 413 F.2d 1061, 1079-1080 (C.A.D.C.).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.